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Residual Discretion: The Concept of Forum of Necessity under the Court Jurisdiction and Proceedings Transfer Act

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Residual Discretion: The Concept of Forum of Necessity under the Court Jurisdiction and Proceedings Transfer Act

Abstract

Under section 6 of the CJPTA, a court may hear a case for which it lacks territorial competence under the statute if it is satisfied that: (1) there is no other court outside the province in which the plaintiff can commence the proceeding; or (2) the commencement of the proceeding outside the province cannot reasonably be required. Courts in provinces that have not enacted the CJPTA have grafted a similar discretion on to the common law rules of jurisdiction. This article seeks to determine the intentions of the drafters of the CJPTA in providing for this power and to discuss how courts have attempted to define its scope so as not to subvert the basic approach to territorial competence taken in the CJPTA.

Keywords

Judicial discretion; Jurisdiction; Canada

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Special Issue
The *CJPTA*: A Decade of Progress

**Residual Discretion: The Concept of
Forum of Necessity under the *Court
Jurisdiction and Proceedings Transfer Act***

MICHAEL SOBKIN*

Under section 6 of the *CJPTA*, a court may hear a case for which it lacks territorial competence under the statute if it is satisfied that: (1) there is no other court outside the province in which the plaintiff can commence the proceeding; or (2) the commencement of the proceeding outside the province cannot reasonably be required. Courts in provinces that have not enacted the *CJPTA* have grafted a similar discretion on to the common law rules of jurisdiction. This article seeks to determine the intentions of the drafters of the *CJPTA* in providing for this power and to discuss how courts have attempted to define its scope so as not to subvert the basic approach to territorial competence taken in the *CJPTA*.

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SECTION 3 OF THE *Court Jurisdiction and Proceedings Transfer Act*¹ delineates an exhaustive list of circumstances in which a court has territorial competence in a proceeding that is brought against a person. In addition, section 6 provides what the marginal notes label as “residual discretion,” which allows a court to hear a case notwithstanding a lack of territorial competence under section 3.² To exercise this discretion, a court must be satisfied that there is no court outside the province in which the plaintiff can commence a proceeding, or that the commencement of proceedings in a court outside the province cannot reasonably be required.

Courts and commentators typically use the phrase “forum of necessity” to describe the jurisdiction granted by section 6.³ This phraseology evokes the idea that a court must act out of necessity to ensure that a plaintiff is not denied

1. The statute was presented at the Uniform Law Conference of Canada in the proceedings of the Seventy-Sixth Annual Meeting, held in Charlottetown, PEI in 1994. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting, 1994*, Appendix C: *Court Jurisdiction and Proceedings Transfer Act*, online: <www.ulcc.ca/images/stories/1994_EN_pdf/1994ulcc0008_Court_Jurisdiction_Proceedings_Transfer_Act.pdf> at 140 [*CJPTA*] (this publication contains both the model statute and the commentary that accompanied it, the latter of which will be referred to as ULCC Commentary in this article). Five jurisdictions have passed the *CJPTA*—British Columbia, Saskatchewan, Nova Scotia, Yukon, and Prince Edward Island—though only three have brought it into force: British Columbia, Saskatchewan, and Nova Scotia. See SBC 2003, c 28 [*CJPTA BC*]; SS 1997, c C-41.1; SNS 2003 (2d Sess), c 2 [*CJPTA NS*]. The *CJPTA*, the ULCC Commentary, and the statutes enacted by these three provinces are reproduced in Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012).
2. British Columbia has enacted the residual discretion provision. *CJPTA BC*, *supra* note 1, s 6. Nova Scotia has also enacted the residual discretion provision. *CJPTA NS*, *supra* note 1, s 7. Saskatchewan has not. For commentary on the status of residual discretion in Saskatchewan, see Black, Pitel & Sobkin, *supra* note 1 at 174-77; Chilenye Nwapi, “A Necessary Look at Necessity Jurisdiction” (2014) 47:1 UBC L Rev 211 at 231-33.
3. See e.g. *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 59, [2012] 1 SCR 572 [*Club Resorts*]. For reference to “forum of necessity doctrine,” see Janet Walker, “Muscutt Misplaced: The Future of Forum of Necessity Jurisdiction in Canada” (2009) 48:1 Can Bus LJ 135. The ULCC used the phrase “forum of last resort.” See ULCC Commentary, *supra* note 1 at 147, comment 6.1. Although not as common as “forum of necessity,” this phrase does appear in the case law. See e.g. *Sooparayachetty v Fox*, 2010 BCSC 185, 187 ACWS (3d) 111 (stating that British Columbia did “not stand out as a forum of last resort” at para 35). Commentators also use the phrases “*forum necessitates*” and “jurisdiction by necessity.” See Arnaud Nuyts & Katarzyna Szychowska, “Study on Residual Jurisdiction (Review of Member States’ Rules Concerning the ‘Residual Jurisdiction’ of their courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations)” (2007) European Commission, online: <ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> at 64; Tracy Lee Troutman, “Jurisdiction by Necessity: Examining One Proposal for Unbarring the Doors of Our Courts” (1988) 21:2 Vand J Transnat’l L 401 at 414-26.

a forum in which to litigate his or her claim. Certainly one branch of section 6—that there is no court outside the province in which the plaintiff can bring a proceeding—suggests a court would be acting so as to ensure that the plaintiff has a single forum in which to bring proceedings. The other branch, however—that the commencement of proceedings outside the province cannot reasonably be required—is broader and offers, at least arguably, the opportunity to assume jurisdiction whenever the court thinks there is a good reason not to require the plaintiff to bring proceedings in another province or country.

The purpose of this article is to explore what the drafters of the *CJPTA* might have had in mind when they recommended inclusion of this power in the statute, and to consider the sort of circumstances that might reasonably support an exercise of residual discretion.

The drafters' comments on residual discretion were brief and suggested a preoccupation with determining how the discretion might be exercised to deal with cases previously addressed by the "necessary or proper party" ground for serving a writ outside the province which had been intentionally left out of the *CJPTA*.⁴ This narrow focus meant that courts had little guidance on how to approach requests made under their residual discretion power. So far, Canadian courts have viewed the threshold for assuming jurisdiction on the basis of forum of necessity as high; only exceptional cases should warrant the exercise of the power. Examples provided in an early decision include situations where the claimant is at serious risk of physical injury if he or she commences litigation in the foreign court that would normally be competent in the matter.⁵ In a few cases, however, courts have been willing to look beyond this narrow range of cases and consider whether the facts of the particular case make it unreasonable to require a litigant to seek justice elsewhere. This approach means that there may be some uncertainty in future cases where a litigant asks the court to exercise necessity jurisdiction. But that is the nature of a reasonableness test, and arguably an acceptable consequence of a rule informed by notions of justice and fairness. Through the gradual accumulation of cases, litigants will learn what does and does not suffice as a basis for an exercise of residual discretion.

4. ULCC Commentary, *supra* note 1 at 151, comment 10.3

5. *Lamborghini (Canada) Inc v Automobili Lamborghini SPA* (1996), [1997] RJQ 58 at para 46, 68 ACWS (3d) 62 (CA) [*Lamborghini*]. This case was decided under the residual discretion provisions of the *Civil Code of Québec*, the model for section 6 of the *CJPTA*. See ULCC Commentary, *supra* note 1 at 147, comment 6.1.

I. CHANGES EFFECTED BY THE *CJPTA*

SECTION 6 IS PART of a comprehensive scheme for determining the territorial jurisdiction of courts. While the language of section 6 dictates when a court can act as a forum of necessity, it is important to situate this section within the broader context of the *CJPTA* as a whole. To the extent that the framers intended to alter the approach to territorial jurisdiction found in the common law and the rules of courts pertaining to service *ex juris*, it may be possible to understand how the framers intended section 6 to operate. It may also be possible to anticipate the likely situations where litigants will ask the court to invoke the new power. If changes brought about by certain provisions of the *CJPTA* narrow the grounds for jurisdiction, a plaintiff may look to section 6 for a solution.

Under the *CJPTA*, territorial competence in actions against persons is determined exclusively by reference to section 3 which states that:

A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in [*enacting province or territory*] at the time of commencement of the proceeding, or
- (e) there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based.⁶

The first three of these grounds concern submission to the court's authority and correspond to traditional common law grounds for assuming jurisdiction over a party.⁷ The fourth ground—ordinary residence—can be seen as a replacement for the traditional common law ground of presence in the jurisdiction at the time of service. Many people present in a jurisdiction will also be resident; but that is not invariably so, and thus this alteration of the common law potentially shrinks the number of individuals over whom the court can exercise authority.⁸

6. *Ibid* at 144 [emphasis in original].

7. Black, Pitel & Sobkin, *supra* note 1 at 61-67.

8. *Ibid* at 68-69.

The final ground—a real and substantial connection—was an attempt to give legislative expression to the Supreme Court of Canada’s decision in *Morguard Investments Inc Ltd v De Savoye* that a court of one province should enforce a judgment of another province where the latter had appropriately exercised jurisdiction—the test being whether there was a real and substantial connection between the original place of suit and the action.⁹ Section 10 of the *CJPTA* provides a list of circumstances where a real and substantial connection is presumed but gives the plaintiff a right “to prove other circumstances that constitute a real and substantial connection between ... [the province] ... and the facts on which a proceeding is based.”¹⁰ Many of the common grounds for service *ex juris* in provincial rules of court were replicated in section 10 as presumed real and substantial connections. However, as discussed in Part II of this article below, the drafters did not include in section 10 the rule that authorizes service on a “necessary or proper party” to a proceeding brought against a person served in the province; nor did they include in the *CJPTA* a general discretion to hear any case in which a court has authorized service outside the province. These exclusions narrowed quite significantly the traditional bases for jurisdiction and increased the likelihood that plaintiffs would call upon a court’s residual discretion to take a case. In particular, the absence of a general power to authorize service of process meant that a court could not assume jurisdiction in a case that did not fall within section 3 even if it considered that the interests of justice would be served by hearing it.

II. INTERPRETING THE RESIDUAL DISCRETION STANDARD

A court’s residual discretion can be exercised if none of the aforementioned grounds in section 3 can be established. Section 6 reads as follows:

A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that:

- (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding, or
- (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot be reasonably required.¹¹

9. *Morguard Investments Inc Ltd v De Savoye*, [1990] 3 SCR 1077 at 1108, 76 DLR (4th) 256.

10. *CJPTA*, *supra* note 1 at 148, s 10.

11. *Ibid* at 146, s 6.

While the standard is clear, the circumstances in which it is met are open to debate.

In ascertaining the kinds of case the drafters envisioned as falling under section 6, it is useful to consider its inspiration, article 3136 of the *Civil Code of Québec*,¹² which in turn was based on a Swiss statute on private international law.¹³ The *Civil Code of Québec*, like the *CJPTA*, sets out the grounds upon which a Quebec court can assume jurisdiction. Article 3136 then furnishes the court with a residual jurisdiction in the following terms:

Even though a Québec authority has no jurisdiction to hear a dispute, it may nevertheless hear it provided the dispute has a sufficient connection with Québec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required.

The drafters of the *CJPTA* stated that section 6 tracks the language of article 3136.¹⁴ As discussed elsewhere, however, section 6 is similar but not identical to article 3136 in that it omits an explicit requirement for the dispute to have “a sufficient connection” with the enacting province.¹⁵ While the matter is not free from doubt, the most likely explanation is that the drafters thought courts would consider whether there was a sufficient connection between the parties or the dispute and the enacting jurisdiction and, if there was none, would probably decline to exercise their discretion under section 6.¹⁶ Certainly in the few cases where a court has assumed jurisdiction as a forum of necessity (either at common law or under the *CJPTA*), there have been connections of varying

12. See art 3136 CCQ.

13. See Black, Pitel & Sobkin, *supra* note 1 at 155. For commentary on article 3136, see John P McEvoy, “Forum of Necessity in Quebec Private International Law: C.c.Q. art. 3136” (2005) 35:1 RGD 61.

14. ULCC Commentary, *supra* note 1 at 147, comment 6.1.

15. Black, Pitel & Sobkin, *supra* note 1 at 164-66.

16. One reason to require a sufficient connection is to fend off arguments that the exercise of residual discretion is unconstitutional. For a discussion of the constitutional issue, see Elizabeth Edinger, “New British Columbia Legislation: *The Court Jurisdiction and Proceedings Transfer Act*; *The Enforcement of Canadian Judgments and Decrees Act*” (2006) 39:2 UBC L Rev 407 at 417; Walker, *supra* note 3 at 136; Black, Pitel & Sobkin, *supra* note 1 at 177-85; Nwapi, *supra* note 2 at 233-42.

strengths between the province and the parties¹⁷ or the litigation,¹⁸ or both.¹⁹ But there may be cases where the parties have no connection to a province other than the presence of a lawyer willing to commence proceedings on behalf of the

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17. See *Bouzari v Bahremani*, [2011] OJ No 5009 (QL) (Sup Ct) [*Bouzari SC*]; *Obégi Chemicals LLC v Kilani*, 2011 ONSC 1636 at para 74, 200 ACWS (3d) 95 [*Obégi*]. Both these cases were decided under the common law doctrine of forum of necessity recognized by the Court of Appeal for Ontario in *Van Breda v Village Resorts Ltd*, 2010 ONCA 84 at paras 54, 100, 109, 98 OR (3d) 721. In *Bouzari*, the plaintiffs were Canadian citizens and residents of Ontario who sued various defendants for torture in Iran. In granting default judgment against one defendant, the court exercised necessity jurisdiction under the common law. Note that the default judgment was subsequently set aside and the defendant brought a *forum non conveniens* challenge which was successful at the Court of Appeal for Ontario. See *Bouzari v Bahremani*, 2015 ONCA 275 at paras 54-55, 126 OR (3d) 223 [*Bouzari CA*]. In *Obégi*, the Ontario Superior Court of Justice took necessity jurisdiction over a Nova Scotia resident in a proceeding commenced to enforce various orders issued in aid of foreign proceedings in Dubai where the defendant was alleged to have participated in a massive embezzlement scheme; the court noted that the defendant maintained a bank account in Ontario. Note that in a different case the Court of Appeal for Ontario reviewed this decision and concluded that it was unnecessary to have exercised necessity jurisdiction. The presence of the defendant's assets in Ontario was "surely an un-rebuttable connecting factor linking the action to freeze those assets to the jurisdiction of Ontario, and entitling Ontario to assume jurisdiction based on the real and substantial connection test." See *West Van Inc v Daisley*, 2014 ONCA 232 at para 37, 119 OR (3d) 481 [*West Van*].
 18. *Josephson (Litigation Guardian of) v Balfour Recreation Commission*, 2010 BCSC 603, 10 BCLR (5th) 369 [*Josephson*]. In *Josephson* the defendant brought third party proceedings against residents of Idaho and British Columbia for medical negligence in circumstances where the plaintiff was injured in an accident in British Columbia but then received medical treatment both in British Columbia and Idaho that allegedly made his condition worse. The BC court took necessity jurisdiction over the Idaho parties. *Ibid* at paras 1-4, 90.
 19. *Cheng v Liu*, 2016 ONSC 3911, 268 ACWS (3d) 543. Ms. Cheng, a citizen and resident of China, brought proceedings against Mr. Liu, a citizen of Canada and resident of Ontario, seeking a divorce, child custody, child support, spousal support, and a division of property. The Ontario court stayed the proceedings in favour of the courts of China. The Chinese court issued the divorce and dealt with custody but did not address child support and property division because of inadequate financial disclosure by Mr. Liu. When Ms. Cheng applied to lift the stay in Ontario so that a court could deal with the financial issues, she was met with the argument that the Ontario court lacks jurisdiction to deal with the matter now that the Chinese court has issued the divorce. The court took necessity jurisdiction. *Ibid* at paras 43-48. The connections to Ontario, then, were the defendant's residence and the original family law proceeding. On appeal, however, the Court of Appeal for Ontario ruled that Ontario has a real and substantial connection to the case by virtue of Mr. Liu's residence in Ontario and that the forum of necessity doctrine did not therefore apply. See *Cheng v Liu*, 2017 ONCA 104 at para 31, 136 OR (3d) 136. It does not appear to have been argued that the doctrine was inapplicable because the dispute in this case was about subject matter competence not territorial competence.

plaintiff. In that case, the absence of a “sufficient connection” requirement may be significant.²⁰

Section 6, as noted, contains two bases upon which a court can act as a forum of necessity: (a) there is no court outside the province in which the plaintiff can commence the proceeding, or (b) there is no court outside the province in which the plaintiff can reasonably be expected to commence a proceeding. Section 6(a) appears directed to a narrow factual inquiry: Is there, or is there not, a court in which the plaintiff can sue?²¹

For example, if the government of a country where a tort was committed abolished all tribunals empowered to hear civil claims there would be no court in which to sue for that tort (assuming the defendant was not amenable to suit elsewhere). Other hypothetical situations include cases where a plaintiff is denied access to the courts because of his or her ethnicity, gender, or religion.²² More difficult to classify is the situation where courts are open to everyone in the jurisdiction in which the facts giving rise to the proceeding occurred but the plaintiff faces barriers that make proceedings in that jurisdiction pointless. This might be the case when a plaintiff cannot get a fair trial because of their membership in a minority group or because of corruption in the legal system. On one view, there is no court where the plaintiff can commence the proceeding; on another, there is an available court but the plaintiff cannot reasonably be required to start an action there given the barriers. The latter seems the better view for it is more faithful to the language of the statute. Furthermore, a court that is unavailable within the meaning of section 6(a) because of barriers of this nature would also be a court in which the plaintiff would not reasonably be required to commence proceedings under section 6(b). Because it can be presumed the

20. This is demonstrated by *Zoungrana c Air Algérie*, 2016 QCCS 2311 at paras 113-14, 268 ACWS (3d) 284. In the case, the plaintiff applied to institute a class action in Quebec regarding a plane crash in Africa. It was accepted that 12 passengers had a connection to Canada while 96 did not. The fact that the actions of all passengers were identical, and could be litigated in one class action, did not constitute a sufficient connection within the meaning of article 3136 of the CCQ so as to give the court necessity jurisdiction over the 96 passengers. The Court of Appeal of Quebec granted a motion to dismiss the appeal on the basis that it had no reasonable prospect of success. *Zoungrana c Air Algérie*, 2016 QCCA 1074 at para 4, 270 ACWS (3d) 458, leave to appeal to SCC refused, 37190 (16 February 2017).

21. Black, Pitel & Sobkin, *supra* note 1 at 166.

22. McEvoy, *supra* note 13 at 108. McEvoy argues that necessity jurisdiction should be available where a party “lacks capacity due to her status as a female spouse or because of a religious or other personal status.”

legislature is addressing different situations in the two subsections, it is preferable to read section 6(a) as dealing with the narrow factual question identified above.²³

When will it be unreasonable to require someone to commence proceedings in a court outside a province? In *Lamborghini*, Justice LeBel, then a judge of the Court of Appeal of Quebec, provided some examples when interpreting article 3136 of the *Civil Code of Québec*. He mentioned “the breakdown of diplomatic or commercial relations with a foreign State, the need to protect a political refugee, or the existence of a serious physical threat if the debate were to be undertaken before the foreign court.”²⁴ In his view, the underlying idea was to provide “access to justice for a litigant on Quebec territory, when the foreign forum that would normally have jurisdiction is unavailable for exceptional reasons such as a nearly absolute legal or practical impossibility.”²⁵ Other courts have also stressed the exceptional nature of the doctrine.²⁶

The question arises why this power should be limited to exceptional cases. The answer appears to be embedded in Justice LeBel’s articulation of the purpose of the rule, namely to provide access to justice when the court “that would normally have jurisdiction is unavailable.” A court will have jurisdiction, as matter of international law, if it respects the territorial principle which generally confines a state’s authority to activities occurring or persons residing within that state’s borders.²⁷ A court may exercise jurisdiction over a dispute that occurred abroad provided there is a real and substantial connection between the forum and the events giving rise to the litigation.²⁸ Residual discretion departs from these principles and may, on the facts, also constitute an exercise of universal jurisdiction, defined as jurisdiction “over acts committed, in other countries, by foreigners against other foreigners.”²⁹ The carefully designed rules of territorial competence articulated elsewhere in the *CJPTA* are an expression of the territorial

23. Black, Pitel & Sobkin, *supra* note 1 at 166. For a different view on how to classify cases under the two strands, at least in the context of article 3136 of the *Civil Code of Québec*, see *ibid* at 106-12.

24. *Lamborghini*, *supra* note 5 at para 46. This is the translation as it appears in the unofficial English translation of the decision of the Court of Appeal of Quebec in *Association canadienne contre l’impunité c Anvil Mining Ltd*, 2012 QCCA 117 at para 98, [2012] RJQ 153. The translation is available online: Société québécoise d’information juridique (SOQUIJ) <soquij.qc.ca/fr/services-aux-citoyens/English-translation>.

25. *Ibid*.

26. *West Van*, *supra* note 17 at para 40; *Danielson v Janze*, 2017 BCSC 413 at para 62, 98 CPC (7th) 130 [*Danielson*].

27. See discussion in *R v Hape*, 2007 SCC 26 at para 59, [2007] 2 SCR 292 [*Hape*].

28. *Ibid* at paras 62, 64.

29. *Ibid* at para 61.

principle and the real and substantial connection ground for jurisdiction. The concern then is with articulating a basis for residual discretion that does not swallow the general rules and turn Canadian courts into fora for every kind of conceivable dispute around the world.

An example of an exceptional situation is furnished by the Ontario case of *Bouzari v Bahremani*.³⁰ The plaintiff Houshang Bouzari alleged that he was the victim of torture in Iran due to his refusal to pay a bribe. The co-defendants included Mehdi Hashemi Bahremani, a son of one of Iran's former presidents. In granting default judgment, the court said there was no reasonable basis upon which the plaintiff "[could] be required to commence the action in a foreign jurisdiction, particularly the state where the torture took place, Iran." This is correct. A person who alleges torture against agents of the state of Iran cannot be expected to return to that country to voice those allegations in a court of law, particularly where those same agents have threatened to kill him.³¹ Indeed, the Court of Appeal for Ontario subsequently described the forum of necessity doctrine as "designed for cases like *Bouzari v. Bahremani*."³²

The focus in *Bouzari* was on the risks that the plaintiff would face if he returned to Iran to seek justice in an Iranian court. However, it has been suggested that courts should act as a forum of necessity where the claims in question are based on compulsory norms of international law, such as the prohibitions against slavery and torture.³³ Mr. Bouzari alleged torture at the hands of agents of the state and thus his claim would engage these international law norms. On this approach Mr. Bouzari, irrespective of whether he faced personal risks in returning

30. *Bouzari* SC, *supra* note 17.

31. See *Bouzari v Iran (Islamic Republic)* (2004), 71 OR (3d) 675 at paras 8-14, 24, 243 DLR (4th) 406.

32. *West Van*, *supra* note 17 at para 40. As stated, the Court of Appeal for Ontario subsequently stayed Mr. Bouzari's action on the basis of *forum non conveniens*. *Bouzari* CA, *supra* note 17 at para 54. Having basically identified Mr. Bouzari's case in *West Van* as a textbook example of where necessity jurisdiction is appropriate, the Court of Appeal for Ontario rather surprisingly failed to endorse the decision when addressing *forum non conveniens* in *Bouzari* CA, stating that "it is unnecessary and inappropriate in our view to address the question of whether jurisdiction *simpliciter* was properly assumed in this case" and that "the contours of the nascent jurisprudence regarding 'forum of necessity' would best be decided in a case in which jurisdiction *simpliciter* on this basis has been directly raised and argued by the parties." *Ibid* at para 35. The fact is that it did address this question in *West Van* and there is no reason to doubt the correctness of its considered view.

33. See Ian Binnie, "Judging the Judges: 'May they Boldly Go Where Ivan Rand Went Before'" (2013) 26:1 Can JL & Jur 5 at 20; François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010) at 172-74, 187.

to Iran, should be able to rely on Canadian courts for justice. Short of a regime change and other societal changes, however, a person in the position of Mr. Bouzari advancing a claim based on international legal principles would also face a risk of personal harm or an unfair trial if he were to return to the country where the alleged harm occurred. The claim for necessity jurisdiction would therefore be made out irrespective of whether the claim was based on compulsory norms of international law.³⁴

It has been argued that necessity jurisdiction ought to be available in a much broader range of cases than described in *Lamborghini*. John McEvoy, for example, argues that “at least in a non-commercial context, foreign proceedings should not be required when the moving party is financially unable to institute such proceedings.”³⁵ This can “constitute a denial of access to justice as the responding party is insulated from proceedings.”³⁶ A plaintiff’s inability to afford litigation has been considered a relevant factor in the *forum non conveniens* analysis. In *Connelly v RTZ Corp Plc*,³⁷ the House of Lords declined to stay proceedings in favour of the courts of Namibia because the plaintiffs would be unable to obtain legal aid in that country. However, when the court is considering whether to stay the action on the basis of *forum non conveniens* it has already concluded that it has jurisdiction. In *Connelly*, for example, the defendants were two English corporations over whom the English courts undoubtedly had jurisdiction. In a forum of necessity case, no similar basis for jurisdiction exists. Rather, the court is being asked to *assume* jurisdiction on the basis of a factor—lack of finances—that may be relevant to determining whether it should decline to exercise a jurisdiction it possesses. Should this matter?

Commentators have argued that, in considering whether to act as a forum of necessity, a court should not perform a *forum non conveniens* analysis.³⁸ This is certainly true as a general statement. As the name implies, territorial competence is based on factors that connect the parties or litigation to the forum; exercises of

34. See Ernest A Young, “Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation after *Kiobel*” (2015) 64:6 Duke LJ 1023 at 1066. Young notes that “in many instances, the domestic situation in the relevant foreign nation is such that an extraterritorial suit in U.S. courts offers the only realistic hope of subjecting the atrocities involved to the rule of law.”

35. McEvoy, *supra* note 13 at 111.

36. *Ibid.*

37. [1997] UKHL 30, [1998] AC 854 [*Connelly*].

38. Black, Pitel & Sobkin, *supra* note 1 at 168-69; Nwapi, *supra* note 2 at 252; Thomas Posnyiak, “Forum of Last Resort or Forum of Juridical Entitlement: Forum of Necessity in British Columbia Following *West Van Inc. v. Daisley*” (2015) 73:1 Advocate 43 at 49-50.

authority over matters where that territorial connection is missing may be seen as illegitimate in the eyes of other provinces or countries, thus having implications for comity and the enforcement of judgments. But this does not mean that a court cannot exercise necessity jurisdiction simply because the reason for doing so would also be relevant in a *forum non conveniens* analysis. Take the case of Mr. Bouzari. The Court of Appeal for Ontario, as noted above, considered forum of necessity to be designed for cases like his. But assume that one of the alleged perpetrators ends up a resident of British Columbia and proceedings are commenced there. The court would therefore have territorial competence under section 3(d), but the defendant could ask the court to stay the proceedings under section 11 in favour of the Iranian courts. Surely in considering “the circumstances relevant to the proceeding,” the court would be entitled to conclude that the risks to the plaintiff’s personal safety did not make Iran “a more appropriate forum in which to hear the proceeding.”³⁹ It follows then that a court is not prohibited from considering under section 6(b) any factor that might also bear on a *forum non conveniens* analysis. This does not advance the inquiry too far as it explains only what is not necessarily excluded, not what is legitimately included.

This brings us back to the example of financial resources. Is it open to a court to exercise residual discretion where it is satisfied that the plaintiff will be unable to afford litigation in another country? Lack of affordability is a problem that plagues litigants in many legal systems. For it to constitute a ground for the exercise of residual discretion would effectively make impecuniosity a new rule of adjudicatory jurisdiction. The concern is with articulating a basis for residual discretion—affordability—which would potentially swallow the established rules of territorial competence. While the power may have more room for operation than suggested by some courts, its extension to situations of impecuniosity would give jurisdiction in far more cases than the drafters intended and which no doubt would be seen as illegitimate in the eyes of foreign defendants and other countries. For this reason, affordability is a factor that should probably be confined to the *forum non conveniens* analysis.

A possible candidate for inclusion are parties who would be regarded as “necessary or proper” within the meaning of the rules for service *ex juris*. Provincial rules of court typically permitted service on a person outside the province who was a necessary or proper party to a proceeding properly brought against a person served in the province. In *AK Investments CJSC v Kyrgyz Mobil Tel Ltd*, the Privy Council reviewed the evolution of this rule in England and adopted some of the previous formulations of the test for determining whether someone is a

39. *CJPTA*, *supra* note 1 at 152, s 11.

proper party, namely whether the claims against the defendants served within and without the jurisdiction “involve one investigation,” are “closely bound up,” or contain “a common thread.”⁴⁰

The drafters intentionally left this ground out of the list of presumed connections under section 10, noting that it “would be out of place in provisions that are based not on service, but on substantive connections between the proceeding and the enacting jurisdiction.”⁴¹ However, the drafters remarked that the court’s residual power under section 6 could be used to exercise jurisdiction “over a necessary and proper party who cannot be caught under the normal rules.”⁴² It explained how this might work:

You will recall that Article 3136 of the Code sets up an extraordinary basis for hearing a dispute, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required. This provision probably captures the situation in which the concept of necessary and proper party ought to be used. A proposal along these lines would leave our basic premise intact, preserve the possibility of using the necessary and proper party approach, but add a further hoop or hurdle of proving that it is impossible or impractical to institute proceedings outside the forum in which the necessary and proper party is sought to be involved.⁴³

It is clear the drafters did not consider the service *ex juris* criteria to form an independent ground for exercising necessity jurisdiction.⁴⁴ If all that is required is that the claim against the party sought to be added is “closely bound up” with the claim against the party over whom the court has territorial competence, it would not be necessary to provide additionally that proceedings elsewhere are “impossible or impracticable.”

The best hope for retaining “necessary or proper party” considerations in the jurisdictional equation may be to argue that the interconnectivity of the two claims is such that on the facts of the particular case there is a real and substantial

40. [2011] UKPC 7 at para 87, [2011] 4 All ER 1027. It is not surprising that the focus is on the word “proper” rather than “necessary” as the latter seems to imply a higher threshold for plaintiffs to meet. Moreover, given the broad meaning ascribed to the word “proper” it has not been necessary to develop a substantial body of law interpreting the word “necessary.” See Black, Pitel & Sobkin, *supra* note 1 at 158.

41. ULCC Commentary, *supra* note 1 at 151, comment 10.3.

42. *Ibid.*

43. See Peter JM Lown, “Court Jurisdiction and Transfer of Litigation – Summary of Comments,” Alberta Law Reform Institute in *ibid* 165 at 171. This explanation was not part of the official commentary to the model statute but rather part of a report on the results of consultations with interested parties.

44. Black, Pitel & Sobkin, *supra* note 1 at 160.

connection between the litigation and the province. The drafters acknowledged this possibility.⁴⁵ But where a court is unable to reach that conclusion it will be necessary for the plaintiff to bring a second proceeding elsewhere unless section 6 can be invoked.⁴⁶ I return to that possibility below.

While the necessary and proper party criterion was singled out for special attention, other grounds for service *ex juris* were also excluded from section 10. Service *ex juris* rules in the past and still today empower a court to authorize service outside the jurisdiction with leave in any case not specifically provided for in the rules.⁴⁷ This would permit a court to consider the propriety of assuming jurisdiction notwithstanding the absence of one of the connecting factors set out in the rules of court—such as a tort committed in the province. In deciding whether to assume jurisdiction under such a broad power, courts have considered

45. See ULCC Commentary, *supra* note 1 at 151, comment 10.3. It is noted that territorial competence over the “necessary or proper” party will need to satisfy the real and substantial connection test. See also the summary of the results of the consultations on the draft statute where the following is stated: “It is possible that the extension of jurisdiction under the rubric of real and substantial connection would catch some of these individuals.” See Lown, *supra* note 43 at 170. Note that such an approach may not be available in common law provinces that have not enacted the *CJPTA* given the Supreme Court of Canada’s holding in *Club Resorts* that a court cannot take jurisdiction where no presumptive connecting factor is established. See *Club Resorts*, *supra* note 3 at paras 81, 93. See also Black, Pitel & Sobkin, *supra* note 1 at 257.

46. Compare *Josephson* and *Danielson* with *McNichol Estate v Woldnik* (2001), 150 OAC 68, 13 CPC (5th) 61 [*McNichol*]. In *McNichol*, the widow and dependants of Mr. McNichol sued persons responsible for his health care prior to his death from a heart attack. All of the defendants were Ontario doctors and hospitals except one, the defendant Dr. Puentes, a Florida chiropractor who saw Mr. McNichol in Florida the day before his death. The Court of Appeal for Ontario found the real and substantial connection test was met. *Ibid* at paras 1, 11-16. In *Josephson*, the plaintiff was involved in an accident in British Columbia and received medical care in both British Columbia and Idaho. The court found the real and substantial connection test was not met. *Josephson*, *supra* note 18 at paras 3, 74-79. Likewise in *Danielson*, where the plaintiff was injured in a motor vehicle accident in British Columbia and the defendants sought to add as third parties a doctor and two medical facilities in the United States, the court found the real and substantial connection test not met. *Danielson*, *supra* note 26 at paras 1-18, 34-57. The court in *Josephson* went on to exercise necessity jurisdiction under section 6 while the court in *Danielson* declined to do so. *Quaere* whether *McNichol* would be decided differently today given the Supreme Court of Canada’s holding in *Club Resorts* that the common law real and substantial connection test requires the establishment of a presumptive connecting factor. See Black, Pitel & Sobkin, *supra* note 1 at 257.

47. See *e.g. Supreme Court Civil Rules*, BC Reg 168/2009 as amended by BC Reg 119/2010, r 4-5(3).

factors that are relevant at the *forum non conveniens* stage.⁴⁸ However, as noted, the fact that service is no longer the touchstone for territorial competence means that a court's ability to hear a case involving defendants residing outside the province has been curtailed.⁴⁹

It should now be apparent that the *CJPTA* is responsible for major changes to the jurisdictional landscape in provinces where it is in force. It used to be the case that territorial jurisdiction could be asserted if the defendant was served in the province. Service has been replaced by the connecting factors set out in section 3. If none of the grounds in section 3 are available, section 6 may offer the only hope for access to justice. The consequence of this change can be measured by examining the situation in the United States where service of process within a state grounds jurisdiction and necessity jurisdiction does not exist. In *Filartiga v Pena-Irala*,⁵⁰ the plaintiffs sued under a statute which provides a federal district court with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁵¹ It was alleged that the defendant kidnapped and tortured to death the son of the plaintiff, Dr. Joel Filartiga, in retaliation for his political activities opposing the regime of President Stroessner in Paraguay. The court was able to exercise territorial jurisdiction because Mr. Pena-Irala had entered the United States on a visitor's visa and was served with a summons while he was being held pending deportation.⁵² Likewise, in *Kadic v Karadzic* a United States district court was able to take personal jurisdiction over the commander of the Bosnian-Serb military forces because he was served with a summons in New York.⁵³ It is unlikely that many perpetrators of human rights violations abroad will visit a province where the *CJPTA* is in force, but if they did, service of process would not give the court territorial competence in the matter; and if they remained outside Canada, an order for service *ex juris* likewise would not furnish jurisdiction. The forum of

48. See e.g. *Tourloukis v Lavrendiadis* (1981), 16 Sask R 250, 24 CPC 266 (QB) (noting that in determining whether to order service of the writ outside Saskatchewan "in all other cases" a court might import *forum conveniens* considerations into the rule).

49. Another ground for service *ex juris* left out of section 10 was "damages sustained" in the province. *CJPTA*, *supra* note 1 at 148-50.. The Supreme Court of Canada concluded that this should not be a presumed real and substantial connection under the common law test. *Club Resorts*, *supra* note 3 at para 89.

50. 630 F (2d) 876 (2d Cir 1980) [*Filartiga*].

51. *Alien Tort Statute*, 28 USC §1350 (2012) (also referred to as the *Alien Tort Claims Act*).

52. *Filartiga*, *supra* note 50 at 879.

53. 70 F (3d) 232 at 246-47 (2d Cir 1995).

necessity doctrine may provide victims of human rights abuses living in Canada with the only mechanism for accessing Canadian courts.⁵⁴

Access to justice may also be a concern for persons who can no longer rely on the “necessary or proper party” criterion. If the persons allegedly responsible for causing loss are dispersed across the country, a plaintiff may have difficulty establishing a court’s territorial competence over all of them. A 1975 Ontario case decided under the necessary or proper party rule brings this into sharp focus. In *Jannock Corp Ltd v RT Tamblyn & Partners Ltd*,⁵⁵ the plaintiff had contracted with the defendant, an Ontario corporation (“Tamblyn”) for the design of a system for storing and refrigerating fish that was installed in boats built for the plaintiff by a British Columbia corporation, Yarrows Limited (“Yarrows”), in British Columbia and by another company in Quebec. The plaintiff sued Tamblyn alleging that the system was not fit for the purpose for which it was intended and also alleged negligence in the design of the system. Tamblyn claimed the damage was caused by the negligence or fault of the shipbuilders and manufacturer of the system and obtained an order *ex parte* permitting service outside of the jurisdiction. The company located in Quebec attorned but Yarrows successfully applied to set aside the order. The Court of Appeal for Ontario overturned this decision. Justice Brooke held that “where persons, whose work and skill are combined to fashion a unit for a purchaser, defend its suit by seeking to blame each other when the plaintiff seeks to allege fault on the part of each or all of them, each and all of them are necessary and proper parties.”⁵⁶

How would this case be decided under the *CJPTA*? Without a presumptive real and substantial connection for the “necessary or proper party” ground, the plaintiff would have to argue that there is nevertheless a real and substantial connection between the litigation and Ontario. However, it is not apparent that such a connection would be found. The ship was built in British Columbia pursuant to a contract made in British Columbia which selected British Columbia law as the governing law and gave (non-exclusive) jurisdiction to the courts of British Columbia. Yet one could convincingly maintain that access to justice considerations militate in favour of a single proceeding to decide all liability

54. The *Justice for Victims of Terrorism Act* creates a cause of action for persons suffering loss or damage as a result of terrorist activity. See *Justice for Victims of Terrorism Act*, SC 2012, c 1, s 2. Section 4(2) authorizes a court to hear and determine an action “only if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act*.”

55. (1976), 8 OR (2d) 622, 58 DLR (3d) 678 (CA) [*Jannock* cited to DLR].

56. *Ibid* at 687.

issues. First, there is the plaintiff's access to justice concerns: It will not wish to spend the time and money litigating responsibility for its loss in two courts. Second, there is society's concern about access to justice: The Supreme Court of Canada has stated that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."⁵⁷ Efficiently managing scarce judicial resources is one way to meet that challenge. How can it be efficient to permit two courts in the same federation to litigate essentially one dispute? Allowing a court to act as a forum of necessity in these circumstances would address these concerns.

It is apparent the drafters of the *CJPTA* did not think necessity jurisdiction could be exercised merely because the traditional criteria for permitting service of process under the necessary or proper party ground were satisfied. They did think, however, that these criteria might be relevant at the residual discretion stage. Consequently, they formulated a standard which the circumstances in *Jannock* could arguably meet: The commencement of proceedings in British Columbia cannot reasonably be required given the inefficiency of litigating in two provinces to resolve one dispute.

This would admittedly be a departure from what a number of courts have held to date, namely that the doctrine is reserved for exceptional cases raising a different kind of access to justice problem. Its purpose is to furnish the court with jurisdiction where there is no other forum, or effectively no other forum, in which the plaintiff can litigate his or her claim.⁵⁸ The Court of Appeal for Ontario has endorsed this ruling,⁵⁹ but in a subsequent decision, discussed below, has also suggested the residual discretion power could be exercised in a broader range of cases.

While it is undoubtedly more convenient to litigate in one forum, "s. 6 is concerned with necessity not convenience."⁶⁰ Moreover, parallel proceedings do exist and are not necessarily an evil to be avoided at all costs.⁶¹ Indeed, one court refused to exercise necessity jurisdiction to avoid multiple proceedings, concluding that while "one-stop access to justice" may be convenient, it does not justify acting as a forum of necessity.⁶² These are challenging issues and it is perhaps unwise to come to any firm conclusion on how cases like *Jannock* should

57. *Hryniak v Mauldin*, 2014 SCC 7 at para 1, [2014] 1 SCR 87.

58. *Lamborghini*, *supra* note 5 at paras 46-49. See also Black, Pitel & Sobkin, *supra* note 1 at 163, 166-67.

59. *West Van*, *supra* note 17 at para 40.

60. Black, Pitel & Sobkin, *supra* note 1 at 168.

61. *Teck Cominco Metals Ltd v Lloyd's Underwriters*, 2009 SCC 11 at para 38, [2009] 1 SCR 321.

62. *Forsythe v Westfall*, 2015 ONCA 810 at para 55, 128 OR (3d) 124. Adopting the statement made by the motion judge.

be decided under the new regime established by the *CJPTA*. A careful assessment of all the facts will be required.

The need for such an assessment is demonstrated by *Josephson*.⁶³ In that case, Mr. Josephson and Mr. Clark were residents of Idaho who went golfing in British Columbia. Mr. Josephson suffered a head injury when he fell out of a golf cart operated by Mr. Clark. He received medical treatment in British Columbia and Idaho. His condition worsened in Idaho. He sued Mr. Clark and the owners of the golf course and golf cart in British Columbia. Mr. Clark filed a third party notice in which he alleged that Mr. Josephson's injuries were caused by the medical treatment he had received in British Columbia and Idaho. The Idaho parties named in the third party notice challenged the jurisdiction of the British Columbia courts. The court found it did not have territorial competence over these parties. None of the presumptive connections in section 10 applied, nor did the facts of the case otherwise constitute a real and substantial connection with British Columbia. The court did, however, agree to exercise necessity jurisdiction under section 6.⁶⁴

The parties filed expert evidence as to the law in Idaho. To sue for medical negligence an injured party must first apply to the Idaho Board of Medicine for a hearing by a pre-litigation screening panel which will issue a confidential and non-binding opinion on the merits of the claim. Mr. Josephson did not file such a request and did not plan on suing the Idaho parties. The evidence also established that only persons in a physician-patient or hospital-patient relationship can be liable for medical malpractice under Idaho law. Mr. Clark could not, therefore, seek contribution and indemnity from the Idaho parties in an Idaho court.⁶⁵ He did not have an available forum for that purpose. He thus argued it would be "unfair to deny him the ability to adjudicate the liability of the Idaho applicants in British Columbia because there is no other court in which he can commence his proceeding for contribution and indemnity."⁶⁶

The court dealt first with the argument that Mr. Clark had an available forum albeit one in which he would be unsuccessful. The Idaho defendants likened this to a claim that is out of time due to expiration of a limitation period. The judge rejected this argument, pointing out that the plaintiff in such a case could always have sued in the foreign court but simply failed to do so. Mr. Clark could not

63. *Josephson*, *supra* note 18.

64. The writer appeared as co-counsel for the defendant Christopher Clark in this case.

65. *Josephson*, *supra* note 18 at para 72.

66. *Ibid* at para 93.

have sued for contribution and indemnity even if Mr. Josephson had brought an action in Idaho for medical negligence.

The court then turned to consider whether to exercise its discretion in favour of hearing the case. It referred to authorities which support hearing related claims in one proceeding. It concluded that “the factual matrix of the third party claims is very closely connected to the claim initiated by Mr. Josephson” and that “[t]he only practical approach is for one court to hear all of the matters relating to the cause of Mr. Josephson’s injuries.”⁶⁷

Josephson has been criticized on the ground that the court gave effect to Mr. Clark’s juridical advantage of suing in British Columbia where contribution and indemnity was available. Juridical advantage is relevant to the *forum non conveniens* analysis and should not form the basis of an exercise of necessity jurisdiction.⁶⁸ But, as noted above, there is nothing objectionable per se about considering a factor (or factors) relevant to the *forum non conveniens* analysis when deciding whether to exercise necessity jurisdiction. It depends on the factor. If a court were to base necessity jurisdiction on a juridical advantage that fell short of depriving a litigant of a forum in which to bring his claim, it would be open to criticism that it is moving too far into the realm of *forum non conveniens*.⁶⁹ But where the plaintiff does not have, and never had, a right to sue in another forum, an exercise of necessity jurisdiction may be justified, depending on the circumstances. The qualification that a plaintiff must never have had a right of action distinguishes the situation from loss of right of action due to expiry of a limitation period. Indeed, Canadian courts have routinely refused to exercise necessity jurisdiction on the basis of an expired limitation period.⁷⁰

It is also relevant to ask whether the party invoking section 6 of the *CJPTA* is somehow responsible for the lack of an alternative forum. For instance, in *Ibrahim v Robinson*, the Court of Appeal for Ontario upheld a decision exercising necessity jurisdiction where the plaintiffs were out of time to sue in

67. *Ibid* at para 100.

68. Posyniak, *supra* note 38 at 50.

69. See e.g. *Sekela v Cordos*, 2015 BCSC 732 at para 47, 77 BCLR (5th) 184 [*Sekela*]. This decision properly rejected as a ground for exercising residual discretion the fact that courts in the State of Washington award limited costs for successful parties.

70. *Mitchell v Jekovich*, 2013 ONSC 7494 at para 49, 28 CCLI (5th) 229 [*Mitchell*]; See also *West Van*, *supra* note 17 at para 37, aff’g *Mitchell*; *Harrowand SL v DeWind Turbines Ltd*, 2014 ONSC 2014 at para 68, 239 ACWS (3d) 630; *Mannarino v Brown Estate*, 2015 ONSC 3167 at paras 40-42, 50 CCLI (5th) 122; *Cook v 1293037 Alberta Ltd (Traveller’s Cloud 9)*, 2016 ONCA 836 at paras 6-9, 272 ACWS (3d) 301, aff’g 2015 ONSC 7989 at paras 25-26, 261 ACWS (3d) 844; *Hurley v Zutz*, 2017 NSSC 46 at para 20, 7 CPC (8th) 401.

Michigan.⁷¹ The court noted that the missed limitation period was not the only reason for acting as a forum of necessity; rather, the motion judge “based his decision on considerations of fairness and access to justice,” including the facts that an intervening change in law by the Supreme Court of Canada negatively impacted the prospects of the court finding jurisdiction and that the defendant’s lengthy delay in bringing his motion “may have lulled the plaintiffs into a false sense of security about the jurisdiction issue.”⁷²

In *Josephson* there likewise was no fault on the part of Mr. Clark. He did not make a tactical decision to refrain from suing in Idaho; he could not sue there because he was not the person who had received the medical treatment and because contribution and indemnity could not be pursued in that state. The lack of contribution and indemnity was not a juridical disadvantage to an Idaho suit because joint and several liability had been abolished in tort actions, so if there was litigation there he would be responsible only to the extent he caused Mr. Josephson’s injuries. But the presence of joint and several liability in British Columbia was a problem because he would be on the hook for 100 per cent of damages. It was this “rare confluence of disadvantages emanating from both legal systems which deprived Clark of a forum for his claim against the Idaho parties.”⁷³ When the court added to this mix the interconnectivity of the claims, it concluded this was an appropriate case in which to exercise its residual discretion.

III. CONCLUSION

A court’s residual discretion under section 6 of the *CJPTA* is concerned with access to justice. But not all barriers can provide a foundation for relief under that section. Rules of territorial competence are themselves barriers, yet no one would suggest that lack of territorial competence under section 3 per se can be used to justify an exercise of necessity jurisdiction. Respect for the territoriality principle and satisfaction of the real and substantial connection test are objectives not to be lightly discarded. In the case of section 6(a), the standard is clear: There must be no court in which the plaintiff can seek redress. This will be met where the court normally competent in the matter ceases functioning. In the case of section 6(b), the standard is also clear but the circumstances in which it will be met are open to debate. Under section 6(b), there is an available forum for adjudication

71. 2015 ONCA 21, 124 OR (3d) 106.

72. *Ibid* at paras 13-14.

73. Black, Pitel & Sobkin, *supra* note 1 at 174.

but the circumstances are such that the plaintiff should not be required to commence proceedings there. This would cover situations like *Bouzari* where, out of a concern for the plaintiff's security, physical and mental, courts will open their doors despite the absence of a substantial connection to the province. The Court of Appeal for Ontario and Court of Appeal of Quebec have commented that the doctrine was designed for such cases. This does not mean it is limited to such cases. In *Josephson* there was an available forum but it was "Kafkaesque" to suggest that the defendant should bring his claim there only to be met with certain dismissal.⁷⁴

A thorny issue arises where there is an available forum but the plaintiff is likely to be unsuccessful for reasons unconnected with the merits of the case. It is necessary to look at the reasons for the lack of success in a foreign court before deciding whether to exercise residual discretion. Barriers to access to justice cannot be self-created. Thus, a plaintiff who fails to sue in time because of a limitation period will generally not be able to obtain relief under section 6. But, where the plaintiff never had the option of suing elsewhere, a court may be justified in acting as a forum of necessity, depending on the circumstances. More difficult is the situation of a plaintiff who simply cannot afford to sue in another forum. This undoubtedly presents a barrier to justice. But given the ubiquity of the problem, this seems more a factor that should be confined to the *forum non conveniens* analysis.

The great unresolved issue concerns claims against multiple defendants where not all of those individuals are subject to the jurisdiction of the court. If the court has territorial competence over one claim, but not the other, can it exercise necessity jurisdiction to hear both? In *Club Resorts*, the Supreme Court of Canada said a "plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia" as this "would be incompatible with any notion of fairness and efficiency."⁷⁵ It was speaking of the situation where there is a real and substantial connection between the defendant, the province, and one of the claims so that, if the other claim against that defendant arises in a different province, the court can take jurisdiction over both. In the "necessary or proper party" situation there are at least two defendants, only one of whom is subject to the territorial competence of the court. This engages access to justice concerns for both the plaintiff and society as a whole, as there can be nothing

74. See *Sekela*, *supra* note 69 (referring to the Idaho parties' "rather Kafkaesque submission that s. 6 did not apply as the defendant was not barred from commencing an action for contribution and indemnity, he was merely bound to be unsuccessful" at para 37).

75. *Club Resorts*, *supra* note 3 at para 99.

more inefficient than having two trials dealing with the same set of facts. But that there is a single set of facts suggests the real and substantial connection test might be met for both claims. This is probably the best option for bringing the two claims before one court. If that test is not met, plaintiffs will have a difficult time convincing a court to exercise necessity jurisdiction. This is because courts will be reluctant to recognize under section 6 a ground for jurisdiction that was intentionally left out of the list of presumed real and substantial connections under the *CJPTA*.